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No. 02-1

IN THE
Supreme Court of the United States

THOMAS R. PHILLIPS, NATHAN R. HECHT, CRAIG T. ENOCH, PRISCILLA R. OWENS, JAMES A. BAKER, DEBORAH G. HANKINSON, HARRIET O'NEILL, and XAVIER RODRIGUEZ, in their official capacities as Justices of the Supreme Court of Texas; TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; and RICHARD TATE, in his official capacity as Chairman of the Texas Equal Access to Justice Foundation,
Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, and MICHAEL J. MAZZONE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM OF RESPONDENTS WASHINGTON LEGAL FOUNDATION AND SUMMERS IN RESPONSE TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Texas Interest on Lawyers' Trust Accounts ("IOLTA") program "takes" private property within the meaning of the Takings Clause of the Fifth Amendment.

2. Whether a claimant whose funds have been appropriated by government officials is entitled to relief, including injunctive or declaratory relief, under the Takings Clause.

3. Whether the Justices of the Supreme Court of Texas, in light of their role in enforcing compliance with the IOLTA program, are entitled to dismissal of the claims against them on grounds of legislative immunity from suit.

PARTIES TO THE PROCEEDINGS

Aside from the parties named in the caption, the following were Defendants/Appellees in the court of appeals: Greg Abbott, Alberto R. Gonzales, and Wallace B. Jefferson, in their official capacities as Justices of the Supreme Court of Texas. Justice Abbott and Justice Gonzales no longer serve in those capacities and thus are no longer parties to this proceeding.

Respondent Washington Legal Foundation is a nonstock corporation; it has no parent corporation, and no publicly held company holds any of its stock.

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MEMORANDUM OF RESPONDENTS SUMMERS AND WASHINGTON LEGAL FOUNDATION IN RESPONSE TO THE PETITION

Respondents Washington Legal Foundation (WLF) and William R. Summers respectfully file this Memorandum in partial support of the Petition for a writ of certiorari.[1] Respondents oppose the grant of the Petition as to Question Three. Respondents do not oppose the grant of the Petition as to Questions One and Two.

Questions One and Two are similar to the questions presented in *Washington Legal Found. v. Legal Found. of WA* ["*WLF v. LFW*"], No. 01-1325. The petition for a writ of certiorari in *WLF v. LFW* was granted on June 10, 2002. Accordingly, the Court may wish to grant the Petition as to Questions One and Two, or to hold the Petition in abeyance pending decision in *WLF v. LFW*. Respondents suggests that granting review as to Questions One and Two is the preferable course. The underlying factual issues have been more fully developed here than in *WLF v. LFW*; thus, granting review in this case might assist the Court in resolving the questions presented by both cases. Respondents believe that Petitioners' formulation of Question Two seriously distorts the record in this case; Respondents have restated Question Two to reflect more accurately the proceedings to date.

STATEMENT OF THE CASE

Texas, like all other states and the District of Columbia, has established an IOLTA ("Interest On Lawyers' Trust Accounts") program. The Texas IOLTA program generates

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[1] Respondent Michael J. Mazzone is not a party to this memorandum. References herein to "Respondents" shall refer to Respondent WLF and Respondent Summers only, unless otherwise noted.

funds to be used for legal services to indigents by requiring lawyers to deposit nominal client funds and client funds held for a short duration into special IOLTA interest-bearing accounts. As with the IOLTA programs in another twenty-five states (including the State of Washington), attorney and client participation in the Texas IOLTA program is mandatory.

The individual Respondents in this case are a lawyer and a client, both of whom are impacted by the Texas IOLTA program and who object to its application to them. Michael J. Mazzone is an attorney licensed to practice law in the State of Texas. Mr. Mazzone maintains an IOLTA account into which he regularly places client trust funds that are either nominal in amount or are reasonably anticipated to be held for a short period of time.

William J. Summers is a citizen of Texas whose business dealings regularly require him to retain the services of lawyers, and those lawyers (including Mr. Mazzone) have on occasion required him to provide retainers to ensure payment of future legal bills. Those retainers have been deposited in IOLTA accounts. At all times since 1993, some of Mr. Summers's funds have been on deposit in IOLTA accounts. In light of his business dealings, he expects to continue to have such funds on deposit in IOLTA accounts for the foreseeable future. Mr. Summers repeatedly made known his objection to having his funds used to support the IOLTA program and thus objected to the placement of his retainers into IOLTA accounts. Mr. Mazzone has explained in response that, due to the relatively small size of the retainers, he was required by state law to keep the funds in IOLTA accounts.

Respondent WLF is a public interest law firm whose members include Texas lawyers similarly situated to Mr. Mazzone and Texas citizens similarly situated to Mr. Summers.

It is (and has been for centuries) a common practice for attorneys to hold funds belonging to their clients in connection with their practice of law. Indeed, the vast majority of today's attorneys could not as a practical matter operate their law practices without collecting client funds and holding them in trust for their clients. The experience of Appellant Michael Mazzone is typical of lawyers throughout the nation. He testified that, in those instances in which a client's ability to pay his/her bills was open to question, his firm felt obliged to require the client to pay a retainer that could be used to cover unpaid bills. Trial Transcript ("Tr.") 40. *See also* Def. Ex. 2 (policy of Mr. Mazzone's law firm was to obtain retainer from all new clients).

For a variety of reasons, before the advent of IOLTA programs, client trust funds often were placed in non-interest-bearing accounts. Efforts to create IOLTA programs began in the 1970s; Florida started the movement to persuade lawyers to deposit client funds in savings accounts and pay the interest to state bar organizations. Under such programs, interest earned on pooled attorney trust accounts is paid to foundations established by state supreme courts, and those foundations in turn distribute funds to groups that hire attorneys who purport to represent the interests of low-income individuals.

The IOLTA program in Texas was created by order of its Supreme Court effective May 9, 1984. The order, now codified as Article XI of the State Bar Rules, provided that an attorney receiving client funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" was permitted to place the funds into an unsegregated interest-bearing bank account (an "IOLTA account") and to pay interest earned on those funds to a nonprofit corporation to be established by rules to be promulgated by the Supreme

Court of Texas. TEX. STATE BAR R. art. XI, § 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon 1984).

To implement Article XI, the Supreme Court of Texas by order dated April 30, 1984 adopted its "Rules Governing the Operation of the Texas Equal Access to Justice Program" (the "IOLTA Rules"). *See* Fifth Circuit Record Excerpts ("R.E.") 8 at 9-19. The IOLTA Rules established the Texas Equal Access to Justice Foundation ("TEAJF") as the nonprofit corporation that was to receive funds paid into the IOLTA program. Consistent with Article XI, the IOLTA Rules specified that funds forwarded to TEAJF from IOLTA accounts were to be awarded as grants solely to nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons." *Id.* at 13.

During the first four years of operation of the IOLTA program (1985-88), funds forwarded from IOLTA accounts to TEAJF never exceeded $1 million a year. On December 13, 1988, the Supreme Court of Texas amended Article XI and the IOLTA Rules to make participation in the Texas IOLTA program mandatory. Pursuant to the amended Article XI and the amended IOLTA Rules, attorneys in Texas who "hold client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" *must* place the funds in an unsegregated "interest-bearing insured depository account," with the interest earned thereon to be paid to TEAJF. Rule 4; *id.* at 9.

The issue of whether client trust funds "are nominal in amount or held for a short period of time," and thus required to be placed in IOLTA accounts, is addressed by Rule 6 of the IOLTA Rules. Rule 6 requires funds to be placed in IOLTA accounts if such funds:

> [C]ould not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset *the cost of establishing and maintaining the account*, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client. Also to be considered are the nature of the proceeding or transaction involved and the likelihood of delay in the need for such funds in such proceeding or transaction.

Id. at 11 (emphasis added).[2] In other words, attorneys are required to factor into their "net interest" calculation their firm's internal costs in establishing and maintaining an interest-bearing account for their clients, *regardless whether* (as will usually be the case) those internal costs are no greater than the internal costs associated with maintaining an IOLTA account.

The IOLTA Rules provide for severe enforcement measures against any attorney who fails to comply with IOLTA's requirements. For example, Rule 24 provides for the automatic suspension of the law license of any attorney who fails to submit an annual "compliance statement" certifying that he is maintaining an IOLTA account in accordance with the IOLTA Rules. R.E. 8, at 17.

The switch from a voluntary to a mandatory IOLTA program became effective as of July 1, 1989. As a result of that

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[2] Rule 6 was amended in 1998 in response to this lawsuit. Earlier versions of Rule 6 appeared to require that funds be placed into IOLTA accounts unless the attorney could generate *net* interest for his/her client by placing client funds in a *separate* interest-bearing account for each client's deposit. Rule 6 now states that attorneys are permitted to pool client funds in an effort to generate net interest.

switch, interest income generated by the Texas IOLTA program has increased several-fold -- to nearly $10 million dollars in its highest year. In 1998-99, TEAJF distributed $5.3 million in IOLTA-funded grants. Nationwide, IOLTA programs generate more than $120 million annually (Tr. 216), indicating that on a typical day about $10 billion in client funds is being held in IOLTA accounts.

As the district court found in its Memorandum Opinion, Mr. Summers gave Mr. Mazzone a $1,000 retainer in May 1993 to secure Mr. Mazzone's counsel in connection with litigation filed against Mr. Summers. Pet. App. 50a. Mr. Mazzone deposited those funds in his firm's IOLTA account, where they remained (and earned interest that was forwarded to TEAJF) through the time of trial in September 1999. *Id.*[3] Because Mr. Mazzone continued to represent Mr. Summers following the bankruptcy filing, Mr. Summers gave Mr. Mazzone an additional $250 retainer in August 1999, and those funds were also deposited in the IOLTA account of Mr. Mazzone's law firm. *Id.* The district court found that Mr. Mazzone's decision to deposit the two retainers in his firm's IOLTA account was in accord with the IOLTA Rules. *Id.* 51a.

Respondents filed suit against the Texas IOLTA program in February 1994 in U.S. District Court for the Western District of Texas. Named as defendants were TEAJF; the Chairman of TEAJF, in his official capacity only; and the nine

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[3] As a result of litigation-related indebtedness, Mr. Summers filed a Chapter 7 bankruptcy petition in June 1999. *Id.* 51a. Mr. Mazzone's law firm was one of Ms. Summers's creditors. After trial and with the permission of the bankruptcy court, the law firm took Mr. Summers's $1,000 retainer as partial payment of his unpaid legal bills.

Justices on the Supreme Court of Texas, in their official capacities only (the "Justices").[4]

In January 1995, the district court granted TEAJF's motion for summary judgment. Pet. App. 147a-168a. The court found that IOLTA depositors lacked any property rights in the interest generated by their funds; and that in the absence of such rights, they could not state claims under either the Fifth Amendment's Takings Clause or the First Amendment.

In September 1996, in an opinion written by Judge John Minor Wisdom, the U.S. Court of Appeals for the Fifth Circuit reversed the grant of summary judgment for TEAJF and remanded the case to the district court for further proceedings. Pet. App. 127a-146a. Labeling the IOLTA program a "modern-day attempt at alchemy" whose supporters claim to have created property from nothing, the court concluded that "it seems obvious that the interest earned in the IOLTA accounts is the property of the clients whose money is held in those accounts." *Id.* 133a-134a. The court declined to determine whether IOLTA violated Respondents' constitutional rights; rather, it remanded the case "for reconsideration in light of the principles explained in this decision and for further factual development of the record." *Id.* 144a. The court affirmed the district court's dismissal of Respondents' claim for a refund of money paid to TEAJF, holding that TEAJF is an arm of the State of Texas and thus possesses Eleventh Amendment immunity from damage claims. *Id.* 145a-146a.

This Court later agreed to review the Fifth Circuit's decision, limited to the issue of whether "interest earned on client trust funds held by lawyers in IOLTA accounts [is] a

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[4] Except as otherwise indicated, the term "TEAJF" will refer to Petitioners collectively.

property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer." 521 U.S. 1117 (1997). In June 1998, the Court answered that question affirmatively and affirmed the Fifth Circuit, holding that interest paid on IOLTA accounts belongs to those whose funds generated the interest. Pet. App. 100a-126a. The Court explained that IOLTA depositors have property rights in the interest income, even though "the interest income at issue here may have no economically realizable value to its owner." *Id.* 112a.

On remand, the district court conducted a non-jury trial in September 1999. On January 4, 2000, the district court granted the Justices' motion for judgment on the pleadings, on the ground that the Justices were legislatively immune from suit. *Id.* 86a-99a. On January 28, 2000, the district court issued a Memorandum Opinion and Order dismissing all remaining claims; the judge found that TEAJF's confiscation of Respondents' property violated neither the Fifth nor First Amendments. *Id.* 44a-85a.

The Fifth Circuit on October 15, 2001 reversed and remanded, with Judge Wiener dissenting. *Id.* 1a-43a. The court ruled that TEAJF's appropriation of property belonging to Respondents -- in the absence of evidence that TEAJF's actions amounted to a tax, user fee, or similar exaction -- was subject to "per se [Takings Clause] analysis" and thus violated the Takings Clause. *Id.* 9a-16a. Turning to the issue of relief, the Court noted that, because TEAJF had succeeded in eliminating Respondents' damage claims by raising an Eleventh Amendment defense, the precise amount of Respondents' loss was not relevant; it was enough, to establish a claim for declaratory and injunctive relief, that Respondents had

demonstrated that they were deprived of property having *some* value. *Id.* 14a-17a. The appeals court rejected TEAJF's contention that damages are the only appropriate remedy for a Takings Clause violation, finding both that TEAJF had conceded (in the prior appeal) that it was subject to prospective injunctive relief for Takings Clause violations and that injunctive relief was proper under the facts of this case. *Id.* 17a-25a. The court also rejected TEAJF's claim (raised for the first time five years after suit was filed) that the Takings Claim was not ripe for review because Appellees did not seek relief in a state forum before filing suit. *Id.*

Finally, the appeals court rejected the Justices' claim that they were legislatively immune from suit. *Id.* 26a-27a. The court found that the Justices played a role in enforcing the IOLTA program, and that they could not invoke legislative immunity to bar judicial review of those enforcement activities. *Id.*

The court remanded the case to the district court for entry of appropriate declaratory and injunctive relief. *Id.* 27a. In light of its ruling, the appeals court found it unnecessary to address Respondents' claims that: (1) the district court failed to address Respondents' trial evidence that virtually all IOLTA depositors would be better off if permitted to opt out of the IOLTA program; and (2) the IOLTA program violated their First Amendment rights.

In June 2002, the Fifth Circuit denied Petitioners' motion for rehearing *en banc*. *Id.* 169a-170a. Seven of the 15 active judges on the appeals court dissented from that denial. *Id.* 170a-171a.

REASONS FOR GRANTING THE WRIT ON QUESTIONS ONE AND TWO

Respondents support granting the writ on Question One and Two, but submit that the Fifth Circuit's decision ultimately should be affirmed.

Phillips v. Washington Legal Found., 524 U.S. 156 (1998), established that IOLTA interest is the property of those clients whose funds generated the interest. TEAJF insists nonetheless that its confiscation of that property does not constitute a "taking" within the meaning of the Fifth Amendment, and alternatively that the "just compensation" it owes is zero even though the property it confiscated has a readily ascertainable value. This Court has *never* denied Fifth Amendment relief in a case raising even remotely similar facts.

In this case, the Fifth Circuit correctly concluded that TEAJF's confiscation of Respondents' property amounted to a Fifth Amendment taking and that Respondents were entitled to a remedy. The Fifth Circuit also correctly concluded that, in light of the unavailability of a damages remedy under the facts of this case, Respondents were entitled to entry of declaratory and injunctive relief. However, as TEAJF notes in its Petition, the Fifth Circuit's decision on each of those points conflicts directly with the Ninth Circuit's *en banc* decision in *WLF v. LFW*. In light of that conflict and the Court's June 10, 2002 decision to grant review in *WLF v. LFW*, it would be appropriate for the Court either to grant this Petition as to Questions One and Two, or to hold the Petition in abeyance pending a decision in *WLF v. LFW*.

Respondents agree with TEAJF that the more appropriate course may be to grant the Petition as to Questions One and Two and consolidate the case with *WLF v. LFW*. Unlike *WLF*

v. LFW, this case has been tried, and findings of fact have been made. The more complete factual record in this case may assist the Court in resolving the legal issues common to the two cases. That is particularly true with respect to the availability of declaratory and injunctive relief. The Ninth Circuit provided only a very abbreviated discussion of its decision that such relief is unavailable to IOLTA depositors; in contrast, the Fifth Circuit explained its contrary decision at length and in the context of a full record. Pet. App. 17a-25a. Respondents also agree with TEAJF that the Texas IOLTA program is somewhat more representative of IOLTA programs nationwide than is the Washington State IOLTA program at issue in *WLF v. LFW*. While the challenges to the two programs raise virtually identical legal issues, *WLF v. LFW* does so in the context of the application of IOLTA to the real estate escrow industry, and most IOLTA programs apply only to lawyers.

I. GRANTING REVIEW ON QUESTION ONE WILL ASSIST THE COURT IN DECIDING WHETHER THE CONFISCATION OF IOLTA INTEREST VIOLATES THE TAKINGS CLAUSE

Respondents agree with TEAJF that the Fifth Circuit's decision is in direct conflict with the Ninth Circuit's decision in *WLF v. LFW* that the confiscation of IOLTA interest does not violate the Takings Clause. The Fifth Circuit held that Respondents' Takings Clause claims were subject to "per se analysis" as set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and similar cases. Pet. App. 9a-12a. Applying that analysis, the court concluded that the confiscation of Respondents' interest income violated their rights under the Takings Clause, without regard to whether they could have earned "net interest" on their own in the absence of an IOLTA program. *Id.* 9a-16a & n.10. In contrast, the Ninth Circuit held that Takings Clause claims

raised by IOLTA depositors were *not* subject to per se analysis but rather should be analyzed under the *ad hoc* inquiry set forth in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978). *WLF v. LFW,* 271 F.3d 835, 857 (9th Cir. 2001). Applying that *ad hoc* approach, the Ninth Circuit determined that the confiscation of the IOLTA depositors' property did not violate the Takings Clause. *Id.* at 861.

By agreeing to review *WLF v. LFW,* the Court has agreed to decide both the appropriate analysis to apply to the Takings Clause claims of IOLTA depositors and, if an *ad hoc* approach is deemed appropriate, whether the Ninth Circuit applied it properly to IOLTA depositors. The Court's analysis of those issues would be assisted if it had Respondents' claims before it at the same time. As noted above, no trial has taken place in *LFW v. WLF*; the case is before the Court on the district court's grant of summary judgment to the Washington defendants. Because a trial has taken place in this case, the Court's examination of these basic Takings Clause issues may be facilitated by inclusion of the trial record below. For example, the uncontested evidence at trial was that $1,000 belonging to Mr. Summers sat in an IOLTA account from 1993 to 1999 despite Mr. Summers's objections, that interest was earned on those funds at rates varying from .9% to 2% per year, and that the interest was forwarded on a regular basis from the IOLTA account maintained by Mr. Mazzone's law firm to TEAJF. There is no similar trial evidence in *LFW v. WLF*; the only evidence that the plaintiffs' funds were being confiscated by Washington State IOLTA authorities takes the form of affidavits and declarations in support of the plaintiffs' motion for summary judgment.

Review of Question One is also appropriate because the Texas case arises in a context more typical of IOLTA

programs nationwide than is the Washington State IOLTA program. The Washington program is unique in that it applies not only to tr ıst funds being held by attorneys but also to escrow funds being held by escrow companies and title companies in connection with real estate transactions. Moreover, the plaintiffs in *WLF v. LFW* all challenge IOLTA in the context of its application to real estate transactions. Respondents do not believe that this factual distinction between the cases will affect the Takings Clause analysis in any way. Nonetheless, if the Court limits it review of IOLTA programs to one involving real estate transactions, the applicability of the Court's ultimate decision in the case to lawyers-only IOLTA programs may be subject to question. By granting review on Question One, the Court can ensure that its decision will settle whether lawyers-only IOLTA programs can withstand Takings Clause challenge. That issue has been nanging over IOLTA programs ever since the Court's 1998 decision in *Phillips*; resolving that issue once and for all in the coming year would serve the interests of both the legal profession and the general public.

II. GRANTING REVIEW ON QUESTION TWO WILL ASSIST THE COURT IN DECIDING WHETHER IOLTA DEPOSITORS ARE ENTITLED TO A REMEDY FOR ANY TAKINGS CLAUSE VIOLATION

Respondents agree with TEAJF that the Fifth Circuit's decision is in conflict with the Ninth Circuit's decision in *WLF v. LFW* that IOLTA depositors are not entitled to a remedy for any Takings Clause violation. The Fifth Circuit held that Respondents were entitled to a remedy for their loss of property rights, regardless whether those rights had economically realizable value. Because Texas had not provided Respondents with any means of obtaining monetary

compensation, the court held that Respondents were entitled to declaratory and injunctive relief. Pet. App. 16a-25a. In contrast the Ninth Circuit held that even if the Washington IOLTA program violated the Takings Clause, IOLTA depositors were not entitled to any compensation because the compensation due under the Fifth Amendment is zero where the depositors could not have earned net interest on their funds if allowed to opt out of the IOLTA program. *WLF v. LFW*, 271 F.3d at 864. The Ninth Circuit also held that those claiming to have been injured by the Washington IOLTA program could not sue for declaratory or injunctive relief under the Takings Clause because monetary compensation is the only permissible remedy in such cases. *Id.* at 848-50.

The Questions Presented in *WLF v. LFW* ask the Court to consider what compensation, if any, is due IOLTA depositors whose interest income has been confiscated by the State of Washington, and whether declaratory or injunctive relief is available to prevent any such confiscation that violates the Takings Clause. The Court's analysis of those issues would be assisted if it had Respondents' claims before it at the same time. In both cases, there has been considerable disagreement among the parties regarding how the loss, if any, suffered by IOLTA depositors should be measured. Those disagreements have led to confusion by the reviewing courts regarding loss claims.

IOLTA supporters (both here and in *WLF v. LFW*) have sought to measure loss by reference to the income-generating potential of IOLTA deposits if IOLTA depositors were permitted to opt out of the IOLTA program. The district judge in this case agreed with that basis of measurement; after making a factual finding that Mr. Summers and similarly situated IOLTA depositors could not generate net income on their trust funds if left to their own devices, the district judge

ruled that Respondents had not suffered any loss compensable under the Takings Clause. Pet. App. 74a. The Ninth Circuit ruled to the same effect. *WLF v. LFW,* 271 F.3d at 864. Respondents, on the other hand, have argued that loss should be measured based on the world as it is; because property with a readily ascertainable value has been confiscated from IOLTA depositors, they have suffered a loss. The Fifth Circuit agreed with that approach. Pet. App. 14a-17a. Respondents have argued alternatively that loss should be measured by whether IOLTA deposits would create actual income to the clients if they were allowed to opt out of the IOLTA program, even if that income might be eaten up by bank fees and their attorneys' overhead charges. *See, e.g., Phillips,* Pet. App. 112a ("The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected."). The full trial record available in this case may facilitate the Court's determination of whether IOLTA depositors suffer any loss for which the Takings Clause requires a remedy.

This case's full trial record may be particularly helpful in determining whether declaratory and injunctive relief are permissible remedies in Takings Clause challenges to IOLTA programs. The Ninth Circuit in *WLF v. LFW* said that such relief is not available, but it did so on the basis of a thin record and with little discussion. *WLF v. LFW*, 271 F.3d at 848-50. In contrast, the trial record in this case contains significant evidence that provides context to the equitable relief issue; and the Fifth Circuit considered the issue at length before determining that such relief is available to Respondents. Pet. App. 16a-25a.

REASONS FOR DENYING THE WRIT ON QUESTION THREE

Although Questions One and Two presented by Petitioners are worthy of this Court's certiorari jurisdiction, Question Three -- whether the Justices are entitled to legislative immunity -- is not.

I. THE APPEALS COURT CORRECTLY DECIDED THE ISSUE OF LEGISLATIVE IMMUNITY, AND PETITIONERS HAVE NOT POINTED TO ANY CIRCUIT CONFLICTS OR CONTROLLING AUTHORITY THAT WAS NOT HEEDED

The Fifth Circuit's determination that the Justices are not entitled to legislative immunity from Respondents' Fifth Amendment claims is not worthy of further review by this Court. Petitioners have cited no court of appeals decision that conflicts with the Fifth Circuit's determination. The sole Court decision upon which Petitioners rely, *Supreme Court of Virginia v. Consumers Union of the United States, Inc.* ["*Consumers Union*"], 446 U.S. 719 (1980), is also the decision upon which the Fifth Circuit principally relied in rejecting immunity. Petitioners do not disagree with the Fifth Circuit's interpretation of *Consumers Union*, but rather with its determination that the actions of which Respondents complain are not legislative in nature. That disagreement is not sufficiently weighty to justify review by this Court.

There is no question that lawmakers (including judges when acting legislatively) are immune from suit for their legislative acts. *Consumers Union,* 446 U.S. at 731-34. Thus, the Justices of the Texas Supreme Court are entitled to legislative immunity from any claim that they acted unconstitutionally in adopting the IOLTA program. But

Respondents named the Justices as defendants not because they *adopted* the IOLTA Rules but because they *enforce* them.

In 1999, five years after suit was filed, the Justices argued for the first time that they are entitled to legislative immunity -- on the ground that the power to enforce the IOLTA rules lies elsewhere. The Justices have waived the argument because their delay has prejudiced Respondents; had it been raised earlier, Respondents would have had ample opportunity to substitute in as a defendant the individual(s) determined to possess enforcement authority.

In any event, the Fifth Circuit's decision that the Justices possess IOLTA enforcement authority (and thus are not entitled to legislative immunity) is correct. IOLTA Rule 24 provides for the automatic suspension *by Texas Supreme Court personnel* of any attorney who persists in not filing an annual statement indicating that he is compliance with the IOLTA Rules. Moreover, Rule 25 permits attorneys to seek an exemption from any of the IOLTA Rules (including Rule 24), and the Justices are the final arbiters of any exemption request.

In the Fifth Circuit, the Justices argued that they were entitled to immunity because they act in their *judicial* capacity, not their enforcement capacity, when they exercise their Rule 24 and Rule 25 powers. However, this Court has held that judges are *not* entitled to judicial immunity from suits seeking declaratory or injunctive relief with respect to their judicial acts. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) ("judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity").

When this case returns to the district court, the Justices will have an opportunity to raise issues regarding the proper scope of any equitable relief, to ensure that the relief does not

impinge upon their legislative powers. The Fifth Circuit's determination that the Justices immunity is limited to matters involving the exercise of their legislative powers is unremarkable and does not warrant further review.

CONCLUSION

For the foregoing reasons, the Petition should be granted as to Questions One and Two and denied as to Question Three.

Respectfully submitted,

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